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On the Growth and Development of Dispute Resolution

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On the Growth and Development of Dispute Resolution

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INTRODUCTION

During the 1980s, major public and private institutions incorporated dispute resolution into their regular course of business at an impressive rate. Hundreds of courts, thousands of schools, many state governments, and scores of communities across the United States and beyond began routinely resolving both complex and simple disputes using the tools of dispute resolution: mediation, arbitration, negotiation, summary jury trials, mediated negotiations, and early neutral evaluations. This Article focuses on three areas of that growth: courts, communities, and public policy.

Traditionally, two schools of thinking are credited with stimulating and in some cases dominating the development of dispute resolution. One school argues that dispute resolution is a practical alternative that can respond effectively to the "over litigiousness" in our society, help clear overcrowded court dockets, and reduce the high cost of litigation. The second school maintains that the transformational values attendant to dispute resolution promise an increased access to justice–by creating forums for disputes that have none–and that dispute resolution can help empower individuals and communities to both own and resolve their problems and disputes.

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When the National Institute for Dispute Resolution ("NIDR") was created in 1982,[1] the contrast in approach and philosophy of the two schools presented a window of opportunity for the field and the Institute to help create a new paradigm. What would help move dispute resolution at this critical juncture was not debate, but experimentation and strategic action. In point of fact the field was only beginning to assert itself. In 1980, only ten court systems had begun using mandatory nonbinding arbitration as a means of diverting civil cases. Fewer than twenty-five law schools had courses in negotiation or dispute resolution. In schools of business, dispute resolution was not offered beyond labor management courses, and professors in other disciplines were just beginning to compare notes. Similarly, the professional associations and national organizations interested in dispute resolution were rooted in labor management traditions, commercial arbitration (American Arbitration Association) or consumer disputes (Better Business Bureau). The Society of Professionals in Dispute Resolution ("SPIDR"), for example, was an offshoot of the Academy of Arbitrators, and the American Bar Association's emerging interest in dispute resolution was limited to neighborhood justice centers, as reflected in the title of its "Special Committee on the Resolution of Minor Disputes." While there were some experimental mediated negotiations over environmental conflicts at the Environmental Protection Agency, that fact was neither well known nor documented. The recently formed Center for Public Resources had just begun outlining its "alternative to the high costs of litigation" strategy to attract and educate corporate counsel and major law firms about dispute resolution. In response to federal cutbacks to cities, the Kettering Foundation was promulgating a new process, developed in 1977, called the Negotiated Investment Strategy, which sought to bring together city, state, and federal agencies and various other stakeholders to negotiate resource investment and allocation.[2]

What we now know as "the dispute resolution movement" is the result of the confluence of the two dominant schools of thought. Building

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[1] In 1982, a partnership of five foundations and corporations–the Ford Foundation, the William and Flora Hewlett Foundation, the John D. and Catherine T. MacArthur Foundation, American Telephone and Telegraph Company, and the Prudential Foundation–created NIDR to encourage the growth and development of dispute resolution. The Institute promotes the creative use of collaborative methods to resolve conflicts through grant making, technical assistance, publishing, and convening conferences and seminars. NIDR's current program focuses on the uses of dispute resolution in public policy, the courts, higher and professional education, primary and secondary schools, and individual communities.

[2] *See* DENISE MADIGAN ET AL., NEW APPROACHES TO RESOLVING LOCAL PUBLIC DISPUTES 18 (National Institute for Dispute Resolution 1990).

on the dispute resolution principles of underlying interests and the possibility of joint gains, those interested in increasing efficiency came together with the social reformers. This marriage of interests gave rise to what is now recognized as part of a national movement to reform civil justice, reinvent government, and rebuild communities in America.

I. COURTS

> America's court system stands as the fundamental dispute processing and resolution institution in our society. . . . Criticism of the courts generally rests not on a challenge to their basic claim to this role . . . but rather stems from the perceived disparity between the actual workings of the court and one or another aspect of the ideal of "equal justice under the law."[3]

Court-annexed dispute resolution means "applying negotiation tools and procedures such as mediation and arbitration to conflicts filed in courts, some of which might go to trial."[4] Court use of these tools ranges from providing a forum for consensual decision making (mediation) to a variety of processes intended to encourage settlement. Settlements may be encouraged either through the use of a neutral who renders an advisory opinion as to the relative merits of the case and its value, or by encouraging attorneys to focus attention on settlement options earlier in the litigation process. Processes may be classed as voluntary or mandatory; their results may be binding or nonbinding. They may be perceived as more or less coercive, depending upon the degree of judicial involvement, the availability of penalties for failure to participate, and a variety of disincentives to proceed to trial.

II. BRIEF HISTORY

Although court use of dispute resolution processes was not totally unknown prior to the 1970s, growing dissatisfaction with the courts (as evidenced by the 1976 Pound Conference on the Causes of Popular Dissatisfaction with the Courts) led to an examination of the use of alternatives to the processes traditionally provided by courts.

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[3] JONATHAN B. MARKS ET AL., DISPUTE RESOLUTION IN AMERICA: PROCESSES IN EVOLUTION 16 (National Institute for Dispute Resolution 1984).

[4] NATIONAL INSTITUTE FOR DISPUTE RESOLUTION ET AL., DISPUTE RESOLUTION AND THE COURTS: A REPORT OF THE NATIONAL CONFERENCE ON DISPUTE RESOLUTION AND THE STATE COURTS 3 (1989).

Although there was much unresolved debate over the causes of dissatisfaction–increased litigiousness, expanded discovery, growth in legislatively created rights during the 1960s, and burgeoning criminal dockets were all credited as sources–critics generally agreed that the litigation process was expensive, often exceeding benefits; that litigation did not provide a timely resolution of disputes; and that transaction costs were consuming resources that could be better applied to the resolution of the problem. In addition, court processes are mystifying and difficult to understand, and require employment of expensive intermediaries–thus creating inequities between parties. Courts transform disputes in ways that obscure the genuine issues between the parties and may be unable to order remedies that address the underlying causes of the disputes. Further, the adversarial nature of the proceedings tends to disrupt continuing relationships between the parties.[5] In response to these criticisms, court systems throughout the United States began examining the potential of dispute resolution options to meet these concerns.

III. STATE COURTS

In 1985, a NIDR-sponsored survey found that barely seventeen states had authorized the use of some form of court-ordered arbitration.[6] At last count, twenty-seven states and the District of Columbia have either enacted statewide legislation or established task forces to plan statewide, court-connected DR programs. These systems include one or more of the following procedures: early neutral evaluation, summary jury trials, mediation, conciliation, mini-trials, private judging, special masters, and settlement conferences.[7] A 1987 National Center for State Courts survey documented that programs for resolving divorce-related disputes were the most prevalent, operating in thirty-six (now thirty-eight) states and the District of Columbia.[8] In addition, the National Center for State Courts estimates there are now more than 1200 dispute resolution programs receiving referrals from state courts.[9] State courts are also actively exploring more comprehensive use of dispute resolution.

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[5] *See generally* AD HOC PANEL ON DISPUTE RESOLUTION AND PUBLIC POLICY, PATHS TO JUSTICE: MAJOR PUBLIC POLICY ISSUES OF DISPUTE RESOLUTION (U.S. Department of Justice, Office of Legal Policy, Federal Justice Research Program 1983).

[6] PATRICIA A. EBENER & DONNA R. BETANCOURT, COURT-ANNEXED ARBITRATION: THE NATIONAL PICTURE 4 (Rand Institute for Civil Justice 1985).

[7] For a glossary of dispute resolution terms, see NATIONAL INSTITUTE FOR DISPUTE RESOLUTION, PROGRESS REPORT 1990, at 8-11.

[8] Susan Myers et al., *Divorce Mediation in the States: Institutionalization, Use, and Assessment*, 12 STATE CT. J. 18 (1988).

[9] National Center for State Courts, Comprehensive State ADR Program Database, Aug. 1991.

IV. FEDERAL COURTS

By authorizing courts to use extrajudicial procedures, the 1983 amendments to the Federal Rules of Civil Procedure spurred the first wave of dispute resolution activity in the federal court system. Today's growing use of dispute resolution is largely the result of the Civil Justice Reform Act of 1990.[10] The 1990 Act calls for every federal district to develop a plan to reduce delay and expense, stating that "[e]vidence suggests that an effective litigation management and cost and delay reduction program should include several interrelated principals including . . . utilization of alternative dispute resolution programs in appropriate cases."[11]

The American Bar Association Section on Litigation recently analyzed and compared expense and delay reduction plans developed by thirty-four pilot federal districts. Fifteen of the reports refer to formal settlement conferences, three districts recommend expanded use of mini-trials, and fifteen of thirty-four plans provide for the use of mediation. Eleven districts intend to experiment with early neutral evaluation and three recommend the use of special masters. Six districts either encourage or have adopted mandatory nonbinding arbitration and seven specifically recommend referral to traditional private arbitration. The programs generally do not link specific dispute resolution techniques to specific types of cases.[12] In general, there is a dearth of research on whether or not dispute resolution options meet the goals of reducing time and costs. Comparative, court-based research is limited. However, virtually all research and evaluation studies find a high degree of user satisfaction with dispute resolution processes.

V. DISPUTE RESOLUTION IN COMMUNITIES

Community dispute resolution is a community-based system that can include mediation, arbitration, conciliation, facilitation, and negotiation. The major factor distinguishing community dispute resolution from other dispute resolution programs is that volunteers play a major role in delivering services.[13] In addition to their allegiance to volunteers,

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[10] 28 U.S.C.A. §§ 471-482 (Supp. 1992).

[11] *Id.* at § 471 cmt.

[12] *ABA Report Details Status of District Court ADR Programs*, 3 WORLD ARBITRATION AND MEDIATION REPORT 241 (1992).

[13] NATIONAL INSTITUTE FOR DISPUTE RESOLUTION, COMMUNITY DISPUTE RESOLUTION MANUAL: INSIGHTS AND GUIDANCE FROM TWO DECADES OF PRACTICE 1 (1991) [hereinafter COMMUNITY DISPUTE RESOLUTION MANUAL].

community dispute resolution programs traditionally have been established as nonprofit organizations or in affiliation with a government agency, court, or other nonprofit agency. They usually maintain an open intake process and encourage voluntary participation by the disputing parties. These programs also may accept mandatory referrals from public agencies such as courts, prosecutors, the police, or administrative agencies.[14]

VI. A BRIEF HISTORY

During the 1960s, local and state human rights commissions experimented with mediation and negotiation methods to resolve racial and ethnic disputes. In 1964, under the landmark Civil Rights Act, the U.S. Community Relations Service ("CRS") was established.[15] Its mission is to assist in preventing violence and opening constructive dialogue between conflicting parties. The CRS mediated numerous disputes involving schools, police, prisons, and other government entities throughout the 1960s.

On the heels of the CRS came another benchmark for dispute resolution. In 1969, with funding assistance from the federal Law Enforcement Assistance Administration ("LEAA"), the Philadelphia Municipal Court Arbitration Tribunal was created. This collaboration between prosecutors and courts provided disputants with a new option for resolving their cases: arbitration hearings. The Tribunal was a joint project of the federal government, the American Arbitration Association, the Philadelphia District Attorney, and the Philadelphia Municipal Court. And in 1970, the Columbus City Prosecutor's office, working with two local law professors, developed a unique program that sought to manage various minor disputes. Also supported with LEAA funds, the Columbus Night Prosecutor program helped settle thousands of cases; in this experiment, the option of choice was mediation.

With the Philadelphia and Columbus programs as models, other communities began exploring ways to marshal community and court resources. With LEAA funding, Atlanta, Kansas City, Los Angeles, Honolulu, Houston, and Washington, D.C., established pilot neighborhood justice centers. Major projects were undertaken to establish dispute resolution entities such as the Institute for Mediation and Conflict Resolution's Dispute Resolution Center in Manhattan; the San Francisco

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[14] *Id.*

[15] 42 U.S.C. § 2000(g) (1992). In 1966, the CRS, which was originally organized under the Department of Commerce, was transferred to the Department of Justice. *See* 5 U.S.C. § 903 (1993).

Community Board Program; the Rochester (N.Y.) Community Dispute Services; and the Boston Urban Court program. By 1980, some eighty community-based centers were in operation. Many were still grounded in grassroots efforts to achieve community empowerment, while others had become more intertwined with local courts.[16]

After nearly fifteen years of experimentation, community justice centers still seemed promising and had well-placed supporters such as Attorney General Griffin Bell and Chief Justice Warren Burger. More importantly, the various applications and new venues for dispute resolution were working.

A. Communities: From "Minor Disputes" to Resolving Local Public Disputes

Increased support from the private sector and successful affiliations with local courts, public agencies and other nonprofit organizations helped the number of community-based dispute resolution programs quadruple in the 1980s. Today, for a growing number of Americans with disputes, achieving a solution means going to one of the more than 400 local community justice centers now operating throughout the United States. Recent estimates indicate that more than several hundred thousand cases per year are being handled by community-based dispute resolution programs. Expanding on their traditional role as centers for the resolution of individual disputes, many of today's community-based dispute resolution centers have become resources for the resolution of public or community-wide disputes. For example:

(1) The Justice Center of Atlanta recently coordinated and participated in the mediation of a dispute over a highway proposed to run through residential neighborhoods.

(2) The Community Board Program in San Francisco has mediated a variety of disputes, including a conflict between police officers and youth in a neighborhood and a dispute over proposed locations of mental health facilities.

(3) In Honolulu, the Neighborhood Justice Center has mediated disputes over facility locations and other conflicts related to growth management.

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[16] *See* COMMUNITY DISPUTE RESOLUTION MANUAL, *supra* note 13, at 1-10. The roots of the community dispute resolution movement can be traced to the social activism of the 1960s and to efforts aimed at reforming or overhauling the U.S. judicial system. In 1965, a presidential Commission on Law Enforcement and the Administration of Justice focused national attention on the country's overburdened judicial system. Its findings helped build a consensus around the need for reform and experimentation inside and outside the court system.

B. Public Policy and Governance

In the October 1989 *Negotiation Journal*, William Ury, Jeanne Brett and Stephen B. Goldberg stated:

> The field of dispute resolution has reached a turning point. Until now, the emphasis has been on developing individual dispute resolution procedures such as negotiation, mediation, and arbitration. It is now time to adopt a broader perspective, asking how these procedures can be most effectively used to form an integrated system for dealing not with just a single dispute, but with the stream of disputes that arise in nearly all relationships, organizations, and communities. Do there exist overarching principles for designing effective dispute resolution systems?
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> In *Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict*, we conclude that such principles do exist. Initially, we distinguished three major ways to resolve disputes: to reconcile the disputants' underlying interests, to determine who is right, and to determine who is more powerful. We argue that in general an interests approach (such as problem-solving negotiation) is less costly and more rewarding than a rights approach (such as court), which in turn is less costly and more rewarding than a power approach (such as strikes or wars). The goal, then, is to design a system that provides interests-based procedures for disputants to use whenever possible, and low cost rights and power procedures as back-ups.
>
> *Getting Disputes Resolved* sets forth six basic principles of dispute design:
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> 1. Put the focus on interests.
> 2. Build in "loop-back" procedures that encourage disputants to return to negotiation.
> 3. Provide low-cost rights and power back-up procedures.
> 4. Build in consultation before, feedback after.
> 5. Arrange procedures in a low-to-high cost sequence.
> 6. Provide the motivation, skills, and resources necessary to make the procedures work.[17]

These principles are now being put into practice and form the basis for much of the current work in public policy dispute resolution.

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[17] William L. Ury et al., *Dispute Systems Design: An Introduction*, 5 NEGOT. J. 357, 357-58 (1989) (discussing WILLIAM L. URY ET AL., GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COSTS OF CONFLICT (1988)).

VII. DISPUTE RESOLUTION & PUBLIC POLICY

Conflict over public issues such as appropriate land use and development, the selection and building of waste dumps and incinerators, highway construction, and the equitable allocation of scarce government resources, have been common for many years. These disputes typically involve diverse parties asserting rights and interests in matters over which the government has marginal control. Often these disputes end up in court, waste valuable public resources, drag on for years, and endlessly divide citizens.

In the mid 1970s, dispute resolution practitioners and academics began focusing attention on large scale disputes in the public domain. From their early work came new tools for the resolution of public disputes, such as mediated and facilitated negotiations and negotiated investment strategies. These new tools were predicated on three active principles: first, they all require the assistance of a neutral third party; second, they require inclusion and participation of all parties having a stake in the outcome of the dispute; and third, they use interests-based rather than rights- or power-based negotiation. Using these principles, dispute resolution practitioners began to demonstrate that large scale public disputes can be more constructively resolved and that dispute resolution tools provide a powerful tool for governments and citizens. For nearly a decade, practitioners tested these new approaches in some "200 individual environmental, land use, budget allocation and other public policy related-disputes."[18]

In 1984, NIDR launched an initiative to formally create the capacity within state governments to use dispute resolution technology, particularly the use of mediated negotiation to resolve complex multi-party disputes. Between 1984 and 1986, NIDR staff, in conjunction with outside advisers (most notably Lawrence Susskind of Harvard University), created the nation's first statewide offices of mediation. Demonstration projects were launched in New Jersey, Hawaii, Massachusetts, and Minnesota. Then, as now, these offices are affiliated with state government, and provide training, dispute resolution services, and a roster of dispute resolution specialists. Using new tools such as mediated negotiation, facilitated dialogues, and consensus-based decision making, these offices bring together parties in conflict, provide various problem-solving strategies, suggest qualified mediators, and consult with state officials and various interest groups on dealing with difficult public disputes. Staff at these

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[18] William R. Drake, *Statewide Offices of Mediation*, 5 NEGOT. J. 359, 359 (1989).

offices broker dispute resolution systems designed for state agencies and endeavor to enhance dispute handling by the three branches of government.

The success of the first four demonstration projects encouraged NIDR to assist in the creation of additional statewide offices of mediation. Between 1988 and 1991, Ohio, Oregon, Florida, and New Hampshire created a capacity within state government to conduct large scale public policy mediation, followed by NIDR-sponsored initiatives for offices in Texas, California, Maine, Vermont, and the first regional/transnational (with Canada) program, in North Dakota and Montana, in 1992.

In the seven years since their creation, statewide offices of mediation have amassed a solid record of achievements. Some notable accomplishments include: helping to preserve nearly 4000 units of low income housing in Newark, N.J., thereby saving nearly $100 million in federal housing funds; mediating a decade-old controversy over the state of Hawaii's water code; and facilitating sensitive public disputes involving prisons, nursing home policies, and toxic waste negligence court cases in Massachusetts.

A. Regulatory Negotiation

Many disputes arise as a consequence of traditional regulatory processes. Regulatory negotiation, or "reg-neg," seeks to create agreement on potentially divisive government rules and regulations before they are issued and thus preempt unnecessary or protracted litigation. "The Regulatory Negotiation Act is the result of a congressional finding that agencies are currently using rulemaking procedures that may discourage affected parties from meeting with each other, negotiating, and sharing information and expertise, thereby giving rise to expensive and time-consuming litigation over agency rules."[19] The goal of the Act is to improve the substance and increase compliance with agency rules, and to decrease litigation challenging agency rules.

Examples of successful use of regulatory negotiation include: the Federal Aviation Administration's negotiation of a revision of flight and rest time requirements for pilots, and OSHA's application of reg-neg to a proposed rule on exposure to MDA, a chemical used in plastics manufacture and which has caused cancer in laboratory animals.[20] The

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[19] Securities and Exchange Commission Task Force on Alternative Dispute Resolution, Request for Comments, Supplementary Information, File No. S7-2-93, at 5, Jan. 1993.

[20] *See Negotiated Rulemaking: Impressive Results All Over the Map*, CONSENSUS 5 (Program on Negotiations, Harvard Law School), Mar. 1989, at 5.

Federal Deposit Insurance Corporation reports that in 1992, use of dispute resolution procedures saved an estimated $1.6 million in legal fees, provided recovery of $8.9 million, and avoided liability valued at $12.9 million.[21]

B. Legislative Activity

Though state governments have been active in legislation related to dispute resolution, much of that legislation has been focused on regulating the growth of the field. However, increasingly states are following the lead of the federal government in crafting legislation that employs dispute resolution as a tool of government.[22]

Beginning with the passage of the Dispute Resolution Act in 1980,[23] which enjoyed support from then President Jimmy Carter and Attorney General Griffin Bell, the federal government has systematically demonstrated interest in dispute resolution. The 1980 Act called for increased research, experimentation, and demonstration projects to study and implement dispute resolution technology. Though ambitious and promising, the Act lapsed after no appropriations were made in 1981. In 1987, reacting to the crisis in rural America, Congress passed the Agricultural Credit Act,[24] which authorized farmer-lender mediation programs to be sponsored by states in cooperation with the Department of Agriculture. In 1990, Congress passed three additional bills with major dispute resolution implications. The Administrative Dispute Resolution Act[25] encourages all federal agencies to adopt comprehensive policies regarding the use of dispute resolution. The Act also requires all federal agencies to review their standard contracts and grant agreements and incorporate dispute resolution options where appropriate. The Negotiated Rulemaking Act[26] encourages federal agencies to use regulatory negotiation in the issuance of new, potentially divisive rules. It also outlines a procedure for the implementation of regulatory negotiation, authorizes funding, and provides incentives to federal agencies. Finally, the Civil Justice Reform Act[27] calls on federal courts to build model

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[21] *FDIC Favors Use of ADRs*, 3 WORLD ARBITRATION AND MEDIATION REPORT 256 (1992).

[22] *See* AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON DISPUTE RESOLUTION, LEGISLATION ON DISPUTE RESOLUTION: FEDERAL AND STATE LAWS AND INITIATIVES PERTAINING TO ADR (1990).

[23] Pub. L. No. 96-190, 94 Stat. 17 (1980).

[24] 7 U.S.C. §§ 5101-5106 (1988).

[25] 5 U.S.C.A. §§ 581-593 (West Supp. 1993).

[26] 5 U.S.C.A. §§ 561-570 (West Supp. 1993).

[27] 28 U.S.C.A. §§ 471-482 (West Supp. 1993).

dispute resolution programs with assistance from the Administrative Office of the United States Courts.

VIII. TRENDS IN DISPUTING

The dispute resolution field has come a long way since 1970. Yet despite the current success, critical questions remain. This part explores several of those questions that will be key to dispute resolution's continued growth and positive contribution to society.

In 1991, NIDR commissioned the Institute for Alternative Futures to prepare a report about plausible future disputing trends in society.[28] As NIDR explored forecasts for disputes over the next ten years and the role of the dispute resolution field, we realized that credible quantitative data is scarce. There is little aggregate data about the universe of disputing and dispute resolution and almost no information on private sector or intra-organizational disputes. The likelihood of generating such data in the short term is poor. However, the report highlighted five major societal trends most likely to affect dispute resolution:

(1) a mosaic society with increasing conflicts due to diversity in communities, schools, and the work place;

(2) increasing poverty and conflicts over resource allocation, benefits, and entitlement;

(3) increasing turbulence in social and political conflict;

(4) renewed political activism and challenges for governance and the management of institutions; and

(5) the impact of globalization and the need for better tools of dispute resolution as governments, communities, commerce, and communications become increasingly interconnected.[29]

Working with forty dispute resolution experts, NIDR explored how these trends would affect disputes and dispute resolution in the United States. The answers we found confirmed that the possibilities are many, since the future will depend on how and in what direction these trends will mesh over time. However, several assumptions can be made that point to a range of probabilities, if not to definite directions:

(1) The opportunity for conflicts, disputes, and differences will increase. A combination of factors, such as technology, economy,

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[28] *See* Institute for Alternative Futures, Dispute Resolution in the 1990's (unpublished report to the National Institute for Dispute Resolution 1991) (on file with author).

[29] *See* National Institute for Dispute Resolution, Winter Retreat Materials 18 (unpublished materials for the National Institute for Dispute Resolution 1991) (on file with author) [hereinafter Winter Retreat Materials].

diversity, new legal rights, changing international context, and the response of existing institutions will have a direct bearing on what these conflicts will be (numbers, types, and intensity). The public and private sector, including the courts, increasingly will have to respond to issues of diversity and to newly emerging disputes. There is a potential both for high levels of confrontation over issues of rights and entitlement and for increased reliance on collaborative modes of problem solving.

(2) The evolution of dispute resolution in the U.S. will be driven by factors that may be more important than the state of the economy. The public and private sectors' decisions on how to handle conflicts may limit dispute resolution to a set of cost saving tools or, at the other extreme, make it a central component of new democratic participation. Similarly, the dispute resolution field (practitioners and scholars) may promote the technical advantages of dispute resolution or stress its value-related, transformational aspects.

(3) The decade will be defined by uncertainty, and changes in the external world will increasingly affect the U.S., including possibilities for massive or narrow shifts in values and definitions of justice.

The demonstrated value of dispute resolution and an ongoing quality check are critical to its progress. For many, the "era of cheerleading" is over, and the field continues to lack a "central nervous system."[30]

Important elements to a productive evolution of dispute resolution include:

(1) Promoting outcome evaluations

As more individuals and institutions turn to dispute resolution, they ask increasingly for proof of good results. The criteria for determining a "good" result goes beyond demonstrations of time and costs savings or initial satisfaction to include compliance rates, indirect impact on related parties, "quality" of agreements as judged by knowledgeable others, and other long range outcomes. Such outcome measures are difficult to define, costly to prove, but important to guiding the evolution of the field, developing markets, and promoting quality control of dispute resolution practice.

(2) Developing theory and linking theory and practice

Despite major advances in academia, disputing and dispute resolution are still being criticized for their lack of theoretical depth. Many academics view the field as marginal, while service providers view academic research and theoretical developments as obscure and irrelevant

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[30] Peter Szanton, Setting a Course: Strategic Choices for the National Institute for Dispute Resolution 15 (unpublished report to the National Institute for Dispute Resolution 1981) (on file with author).

to practice. Our experts called for better links between the two communities. Several pointed to the need of improved market analysis research.

(3) Improving public knowledge of dispute resolution

The lack of general public understanding of and support for dispute resolution continues to be deplored. Experts see these as critical to a broader adoption and use of dispute resolution as a way of increasing demand to match supply.[31]

In 1992, NIDR commissioned a national study to survey public opinion toward dispute resolution. Among the findings were:

(1) After receiving some education about dispute resolution, including a short description of litigation, arbitration and mediation, Americans would prefer to go to a mediator (sixty-two percent) or arbitrator (fifty-four percent), rather than go to court. About one third (thirty-four percent) still prefer to go to court.

(2) The majority of people say the most important thing about solving a problem is that it come to a fair conclusion (forty-one percent) or that they *actively participate* (twenty-one percent) in its resolution. These people value most the peace of mind and sense of self-satisfaction that stem from fair solutions and active participation.

(3) Upon conclusion of the survey interview, a sound majority (eighty-two percent) of the respondents said they would be likely to use an arbitrator or mediator instead of going to court the next time they get into a dispute with someone. Those who value peace of mind and security were more likely than those who value control to opt for arbitration or mediation instead of litigation. Most people value the peace of mind they achieve by knowing that a problem comes to a fair conclusion and that they actually participate in the solution.[32]

There is a trend toward professionalizing the field. Because of the field's grassroots origins, the idea of "creeping professionalism"[33] is looked upon by some with disfavor and welcomed by others. Many mediators believe that there is no correlation between professional or educational background and mediator skill. There is fear that dispute resolvers, by setting themselves apart from the disputants as experts, will discourage their clients from learning dispute resolution skills. Those who run court-based or state programs, however, have a legitimate concern over the quality of the service provided to the public.

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[31] *See* Winter Retreat Materials, *supra* note 29, at 27.

[32] NATIONAL INSTITUTE FOR DISPUTE RESOLUTION, NATIONAL SURVEY FINDINGS ON: PUBLIC OPINION TOWARDS DISPUTE RESOLUTION 4-5 (1992).

[33] Paul Wahrhaftig, *Nonprofessional Conflict Resolution*, 29 VILL. L. REV. 1463, 1470 (1983-84).

Experts believe that, despite an apparent growth in sponsorship of dispute resolution by public institutions, these initiatives suffer from several shortcomings. For example, dispute resolution legislation seldom provides the resources needed for effective, quality programs. Moreover, few public employees are familiar with the potential of dispute resolution, with attendant consequences of lack of use, or poor monitoring of programs. Also, most of the public institutions adopting dispute resolution ignore the special needs of poor people. There is little or no outreach to such groups as social workers, corrections officers, or public health care specialists.

In courts, dispute resolution initiatives tend to become routinized, and often fail to lead to innovative and creative responses to disputes that reach the courtroom. Most courts that sponsor or fund dispute resolution programs view them as expedient mechanisms to reduce caseloads, not as different and improved solutions to conflicts. These and similar comments point to a concern about the quality of publicly supported initiatives, or the lack of understanding of dispute resolution by its public sponsors. They call for increased technical assistance and educational programs. Grassroots or community efforts–whether in community mediation programs, advocacy groups or coalitions–tend to lack the resources and leadership needed for their efforts. The programs are seldom financially solvent and lack "marketing" know-how.

Many point to the need of increasing the involvement of and building leadership within cultural minorities so that they can use dispute resolution more broadly, or participate in the delivery and shaping of dispute resolution services.

> Finally, there is likely to be an increase among American dispute resolution specialists turning to new, international markets to assist, intervene and educate international clients about dispute resolution advances in the United States. Many ad hoc efforts have already been taking place since the mid-1970s, with more recent increases aimed at South Africa, Eastern Europe, and what was formerly the Soviet Union. Some view these as positive developments, indicia of an increasing globalization of information, and useful contributions toward peace and understanding. Others express concerns about a lack of knowledge and understanding of other cultures and contexts and, at worse, a fear that these exports represent a new form of cultural imperialism.[34]

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[34] *See* Winter Retreat Materials, *supra* note 29, at 23-24.

CONCLUSION

Just as the field is wrestling with concerns, it continues to seek new challenges. The overview of dispute resolution's evolution during the last two decades as presented in the preceding pages represents some of the developmental highlights of the field. It has moved from nonbinding arbitration in individual courts to a movement to incorporate comprehensive court-based dispute resolution delivery systems statewide, and from ad hoc uses of mediated negotiation to integrated dispute resolution options across branches of government. Dispute resolution is becoming part of the vocabulary of the consensus-based New Civics, where dispute resolution processes can become critical in bringing citizens to the table as full partners in policy formulation and implementation. Richard Harwood writes that

> [c]itizens do engage in specific areas of public life–mostly in their neighborhoods and communities–but only when they believe they can make a difference and help bring about change . . . Reconnecting citizens and politics will take more than legislative changes that attempt to make the system and its loyalists more accountable. . . . Many citizens now find themselves at a loss about just how to participate in politics.[35]

It is the process and attendant skills of mediation that are being drawn upon to increase citizen participation and build consensus at all levels of government. More and more, dispute resolution techniques are the process of choice to resolve conflicts before they ripen into legal battles in the courts or disputes are being resolved at the site of their creation. For example, building on the line of recent Supreme Court cases that permit use of binding arbitration in many kinds of contracts,[36] organizations ranging from the stock exchanges to California banks, and employers large and small, are applying dispute resolution system design principles into their policies and practices. Dispute resolution techniques are also being incorporated into the provision of social services, as in special education mediation, obtaining informed consent by dialysis patients, and attempts to integrate social service delivery through

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[35] Richard C. Harwood, *Citizens and Politics: A View from Main Street America*, *in* EXECUTIVE SUMMARY, 1991, at 6-7.

[36] *See* Gilmer v. Interstate/Johnson Lane Corp., 111 S. Ct. 1647 (1991); Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989); Shearson/American Express v. McMahon, 482 U.S. 220 (1987); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985).

collaborative arrangements between provider agencies. We see new experiments in dispute resolution systems approaches, as with the integration of total quality management and dispute resolution techniques in corporate management such as Motorola's and Saturn's.[37] Another innovation is the potential use of early neutral evaluation to resolve disputes arising from employer provided pension programs as proposed by the Pension Rights Center.[38]

And finally, this decade will see greater use of processes designed to prevent dispute formation and/or to intervene at an earlier stage of conflict. Examples of preventive models include the "softer" methods to reconcile conflict such as training in communications and prejudice reduction provided by schools and employers. Early intervention applications include grievance mediation, peer mediation programs in schools, and ombudsman's use of dispute resolution skills to resolve conflicts in nursing homes.[39] Finally, more and more clear "up-front" agreements regarding how disputes will be handled should they arise, including consumer contracts, prenuptial agreements, advanced directives and living wills will be seen.

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[37] *See* David P. Pierce, *The Federal Arbitration Act: Conflicting Interpretations of its Scope*, 61 U. Cin. L. Rev. 623, 642; Richard H. Weise, *The ADR Program at Motorola*, 4 NEGOT. J. 381 (1989).

[38] *See* MARILYN PARK, ERISA EARLY EXPERT EVALUATION: A DISPUTE RESOLUTION MODEL FOR PENSION BENEFIT CLAIMS (National Institute for Dispute Resolution 1991).

[39] *See, e.g.*, HOY STEELE, COMMUNICATION AND CONFLICT RESOLUTION: SKILLS FOR NURSING HOMES: A TRAINING SERIES IN FIVE MODULES (National Institute for Dispute Resolution 1992).